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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA

v.

JOSEPH B. EISENBERG,

Defendant.

Criminal No. 04-0296 MJJ

SENTENCING MEMORANDUM
AND MOTION FOR DEPARTURE

Date: May 25, 2006

Time: 2:00 p.m.

Court: Hon. Martin J. Jenkins

INTRODUCTION

On November 18, 2004, defendant Joseph Eisenberg pled guilty to a one-count Information charging him with participating in a conspiracy to fix the price of certain rubber chemicals sold in the United States and elsewhere, in violation of 15 U.S.C. § 1. The United States has sought a continuance in this matter; currently, Defendant is scheduled to be sentenced by this Court on May 25, 2006.

For the reasons described below, at this time the United States requests that this Court impose the following sentence on Defendant: (1) 12 months imprisonment; (2) one year supervised release; (3) a fine of \$50,000; and (4) a special assessment of \$100.

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1 **ARGUMENT**

2 **A. Probation Office's Sentencing Recommendation**

3 The Presentence Report issued by the Probation Office (hereinafter "PSR") calculates a
4 total offense level of seventeen (17) and a Criminal History Category of I, resulting in a U.S.S.G.
5 custodial range of 24-30 months, up to one year of supervised release, a fine not to exceed
6 \$350,000, and a \$100 special assessment. Because the Guideline range falls into Zone D, the
7 minimum term must be satisfied by a sentence of imprisonment. U.S.S.G. § 5C1.1(f). The PSR
8 states that Defendant has no criminal convictions, which results in zero criminal history points
9 and establishes a Criminal History Category of I. The United States agrees with this analysis.
10 The United States also agrees with the PSR that the offense level should be increased by three
11 levels due to Defendant's position as a manager or supervisor and due to the criminal activity
12 involving five or more participants. U.S.S.G. § 3B1.1. The nature of Defendant's role in the
13 offense is more fully detailed in the Declaration of Jeane Hamilton in Support of the United
14 States' Sentencing Memorandum and Motion for Departure (hereinafter, "Hamilton
15 Declaration").

16 The Probation Office's recommendation concludes that, based on the actions of
17 Defendant and the seriousness of the offense, the Sentencing Guidelines' recommended 24-30
18 months custodial sentence would ordinarily be appropriate in this case. The Probation Office
19 recommends a downward departure of seven offense levels, however, and advises that an
20 appropriate sentence consists of three years probation, with twelve months home detention using
21 electronic monitoring, a fine of \$350,000, 200 hours of community service and a special
22 assessment of \$100.

23 The Probation Office concluded that a downward departure was justified due to the
24 mental condition of Defendant's wife. Specifically, the Probation Office determined that her
25 dependence on Defendant created extraordinary family responsibilities that warranted a
26 departure pursuant to U.S.S.G. § 5H1. The basis for that conclusion appears to be a single letter,
27 provided by Dr. Jeremy August, a psychiatrist for both Defendant and his wife, that consists of
28 two conclusory paragraphs. The letter provides a superficial analysis of a complex medical

1 condition; it does not provide the factual basis necessary to determine whether a downward
2 departure is justified. Pursuant to prevailing Ninth Circuit authority, the existing record in this
3 matter requires further development and analysis to determine (1) the extent of Mrs. Eisenberg's
4 Affective Bipolar Disorder and her need for care; and (2) whether any feasible alternatives exist
5 that are relatively comparable to Defendant's care. Because there are significant gaps in the
6 record relating to crucial components of an "extraordinary family circumstances" determination,
7 any downward departure based on the existing incomplete record would be inappropriate. *See*
8 *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005), *superseded by amended opinion*, —
9 F.3d. — , 2006 WL 1228940, at *6 (9th Cir. May 9, 2006).

10 "The district courts, while not bound to apply the Guidelines, must consult those
11 Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220,
12 264 (2005). Under the Sentencing Guidelines, "[f]amily ties and responsibilities and community
13 ties are not ordinarily relevant in determining whether a sentence should be outside the
14 applicable guidelines range." U.S.S.G. § 5H1.6 (2001). A downward departure based on these
15 factors may be permitted, however, where the circumstances involve situations where Defendant
16 is an *irreplaceable* caretaker of children, elderly, and/or seriously ill family members, and the
17 extent of the departure appropriately serves to protect those family members from the impact of
18 Defendant's prolonged incarceration. *See United States v. Leon*, 341 F.3d 928, 931 (2003).
19 Moreover, when evaluating departures for family circumstances under U.S.S.G. § 5H1.6, "courts
20 should assess the nature of the care that the defendant provides to his or her family members and
21 determine whether 'there are *feasible* alternatives of care that are relatively comparable' to the
22 defendant's." *Menyweather* at 1228946 (internal citations omitted) (emphasis in original).

23 The limited information in the record suggests that an inquiry into the existence of
24 feasible alternatives will produce facts material to the Court's evaluation of Defendant's claim
25 and, ultimately, Defendant's sentence. Letters submitted to the Court by Defendant indicate that
26 he has two daughters and a number of close personal friends who could participate in assisting
27 Mrs. Eisenberg. If the facts establish that this care is available, then a feasible alternative to
28 Defendant's personal care exists. Another alternative may also be available: the record and the

1 PSR indicate that the Eisenbergs' net worth is over \$5 million and their *net* income is \$5,000
2 monthly. The record should be further developed to ascertain whether professional care could be
3 secured for Mrs. Eisenberg during Defendant's period of incarceration.

4 Although the limited record indicates that Defendant is an integral part of Mrs.
5 Eisenberg's care, nothing in the record suggests that he is the *only* person capable of providing
6 her with a similar level of care. *See United States v. Sierra-Castillo*, 405 F.3d 932, 938 (10th
7 Cir. 2005) (finding that defendant failed to show that downward departure would have been
8 warranted on basis that his incarceration would deprive his wife of financial and emotional
9 support during serious illness, where claim was not supported by any evidence and there was no
10 suggestion in the record that he was the only person capable of caring for wife); *see also Elliott*
11 *v. United States*, 332 F.3d 753, 769 (4th Cir. 2003) (finding that defendant, who was responsible
12 for caring for seriously ill husband, was not "irreplaceable" where record indicated that
13 defendant had a strong family and community support network, evidenced by testimony of
14 daughter, granddaughter, and affidavits of son-in-law and various friends). Indeed, the record
15 indicates that Defendant became integral in his wife's care only recently, during retirement. The
16 Eisenberg's youngest daughter, Elizabeth Eisenberg, stated in her letter to the Court that
17 Defendant was working significant hours and traveling around the world during difficult periods
18 in her and her mother's lives. The fact that Defendant may not have been an indispensable care-
19 giver throughout the course of his wife's illness indicates that there is some potential for
20 alternative and comparable aid during the period of Defendant's incarceration. Without a
21 developed record, however, determining the level and extent of any potential alternative aid is
22 difficult.

23 The limited information available in the existing record indicates alternative care for
24 Defendant's wife may be feasible. Developing the record could significantly assist the Court in
25 evaluating the extraordinary family circumstances justification offered by Defendant and
26 adopted by the Probation Office. The record does not currently warrant a downward departure.
27 If the Court determines that further development is unnecessary, the government respectfully
28 urges the Court to take into consideration the limited evidence present in the existing record

1 relating to the possibility of feasible alternative care.

2 **B. Status of Other Defendants in the Rubber Chemicals Investigation**

3 Two corporations have pled guilty to participating in the rubber chemicals antitrust
4 conspiracy and have been sentenced by this Court. Crompton Corporation (“Crompton”), the
5 Defendant’s employer during the period he participated in the conspiracy, pled guilty on May 27,
6 2004 and was sentenced to pay a \$50 million fine (CR 04-0079 MJJ). Bayer AG pled guilty on
7 December 9, 2004 and was sentenced to pay a \$66 million fine (CR 04-0235 MJJ). Both
8 Crompton and Bayer pled guilty to participating in the conspiracy during the period July, 1995 to
9 December, 2001.

10 In addition to Defendant, one other former Crompton employee has pled guilty: James J.
11 Conway, Defendant’s successor as Executive Vice President, pled guilty on November 4, 2004
12 for participating in the conspiracy from February, 2000 to December, 2001 (CR 04-0302 MJJ).
13 Conway is scheduled to be sentenced before this Court on September 14, 2006.

14 Four Bayer AG employees have been charged with participating in the rubber chemicals
15 conspiracy. Wolfgang Koch, a former Bayer product manager of rubber chemicals, pled guilty
16 and was sentenced on May 24, 2005 for participating in the rubber chemicals conspiracy from
17 January, 1999 to December, 2001 (CR 05-0314 MJJ). Pursuant to the terms of a Fed.R.Crim.P.
18 11(c)(1)(C) plea agreement, Koch agreed to a sentence of four months imprisonment, a \$50,000
19 fine and a \$100 special assessment. This Court sentenced Koch consistent with the terms of the
20 plea agreement.

21 Martin Petersen, the former Director of Marketing for Rubber Products at Bayer AG,
22 pled guilty to participating in the rubber chemicals conspiracy from December, 2000 through
23 December, 2001 (CR 04-0386 MJJ). The U.S. Probation Office recommended that Petersen
24 serve a sentence of 12 months and one day in custody, one year supervised release, a fine of
25 \$150,000 and a \$100 special assessment. The United States recommended 8 months
26 imprisonment, one year supervised release, a fine of \$50,000 and a special assessment of \$100.
27 On August 18, 2005, this Court sentenced Petersen to four months imprisonment, a \$50,000 fine,
28 a \$100 special assessment and one year of supervised release upon completion of incarceration.

1 Two other Bayer executives were indicted for participating in the rubber chemicals
2 conspiracy: Jurgen Ick, Director of the Rubber Business Group at Bayer AG, and Gunter Monn,
3 Director of Marketing for Bayer's Rubber Products, were both indicted on August 10, 2005 (CR
4 05-0520 MJJ and CR 05-0519 MJJ). Each remain fugitives subject to outstanding arrest
5 warrants.

6 **C. Government's Motion for Downward Departure and Sentencing Recommendation**

7 Defendant has cooperated fully with the government in its investigation into violations of
8 federal antitrust laws involving the manufacture and sale of rubber chemicals in the United
9 States and elsewhere. Defendant also provided material evidence in two other ongoing criminal
10 antitrust investigations. Through his cooperation in these matters, Defendant has provided
11 substantial assistance to law enforcement authorities within the meaning of U.S.S.G. § 5K1.1.
12 The nature of Defendant's cooperation in these investigations is more fully detailed in the
13 Hamilton Declaration. Based on Defendant's substantial assistance, the government moves,
14 pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553, for a downward departure of Defendant's
15 offense level calculation of seventeen (17) to an offense level of thirteen (13). An offense level
16 of 13 with a Criminal History Category I results in a custodial sentencing range of 12-18 months.
17 Taking into account the serious nature of Defendant's conduct and his role in the offense,
18 Defendant's cooperation, the seriousness of the offense and the need for the sentence to provide
19 just punishment and afford adequate deterrence, the government recommends that Defendant be
20 sentenced as follows: (1) 12 months imprisonment; (2) one year supervised release; (3) a fine of
21 \$50,000; and (4) a special assessment of \$100. The government agrees with the PSR that an
22 order of restitution is not appropriate in this case.

23 **1. Nature of Defendant's Conduct and Role in the Offense**

24 The conspiracy began in July, 1995, under Defendant's stewardship as Crompton's
25 Executive Vice President for Performance Chemicals and Elastomers, and continued throughout
26 the remainder of Defendant's tenure of approximately five years in that position. During that
27 time, Defendant met with his competitors in the rubber chemicals industry to discuss suppressing
28 and eliminating price competition for the sale of certain rubber chemicals.

1 In addition to Defendant's own conspiratorial meetings, three of Defendant's
2 subordinates participated directly in the conspiracy by meeting with competitors in the rubber
3 chemicals industry and discussing methods to eliminate price competition for certain rubber
4 chemicals. Defendant's subordinates regularly reported the substance of these conversations to
5 Defendant. As Executive Vice President, Defendant had the authority to instruct his
6 subordinates to refrain from participating in the conspiracy, but he gave no such instruction.
7 Instead, at times Defendant instructed his subordinates to meet with their co-conspirators in
8 order to further the goals of the conspiracy.

9 When Defendant left his position as Executive Vice President, he introduced his
10 successor, James J. Conway, to Crompton's co-conspirators, thereby furthering the continued
11 success of the conspiracy.

12 A more detailed description of Defendant's actions is contained in the Hamilton
13 Declaration.

14 **2. Seriousness of the Offense**

15 The sentence imposed by the court should reflect the seriousness of the offense. 18
16 U.S.C. § 3553(a)(2)(A). The rubber chemicals conspiracy affected a vast number of consumers
17 because rubber chemicals are present in a wide variety of products used daily; rubber chemicals
18 are used in the manufacture of tires, outdoor furniture, hoses, belts and footwear. In addition,
19 Defendant's criminal activity defrauded a substantial number of purchasers of rubber chemicals
20 worldwide, including purchasers in the United States, and affected hundreds of millions of
21 dollars in U.S. commerce. While some indication of the scope of the harm caused by the
22 conspiracy is reflected in the criminal fines totaling \$116 million paid by Crompton and Bayer
23 AG in this case, those fines are not a comprehensive picture of the harm inflicted by the
24 conspirators because both firms received substantial discounts on their fines due to their
25 substantial assistance in the rubber chemicals and related investigations.

26 **3. Adequate Deterrence**

27 In determining the sentence in this case, the Court should also consider the importance of
28 imposing a sentence that affords adequate deterrence. 18 U.S.C. § 3553 (a)(2)(B). The need for

1 general deterrence is particularly important in antitrust prosecutions. *See* U.S.S.G. § 2R1.1,
2 Commentary, Background (“The controlling consideration underlying this guideline is general
3 deterrence.”) Antitrust crimes, particularly international conspiracies such as the conspiracy in
4 this case, are typically very difficult to investigate and prosecute because documents and
5 witnesses are located outside the United States’ jurisdiction. The most effective deterrent for the
6 type of crime committed by Defendant is imprisonment. Unlike a fine, which may be paid by an
7 executive’s employer and then becomes just another cost of doing business, incarceration
8 provides a just punishment for the offense.

9 **CONCLUSION**

10 As further detailed above, the United States respectfully requests that this Court impose
11 the following sentence on Defendant: (1) 12 months imprisonment; (2) one year supervised
12 release; (3) a fine of \$50,000; and (4) a special assessment of \$100.

13 DATED: May 18, 2006

Respectfully submitted,

14
15 /s/

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